85-327 (1)

Supreme Court, U.S.
JUL 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY WARD,

Petitioner,

vs.

L & C MARINE TRANSPORT, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI FEDERAL CIVIL CASE

BILLY E. MOORE
COUNSEL FOR RECORD
LAW OFFICES OF BILLY E. MOORE
Attorney for Petitioner

Post Office Box 2565
Columbus, Georgia 31902
(404) 323-3691

90

QUESTION PRESENTED

Does the 'clearly erroneous' standard of review set forth in Fed. R. Civ. P. 52(a) mean that a reviewing Appellate Court can ignore uncontroverted evidence presented to the fact-finder and affirm a determination contrary to what the uncontroverted facts suggest?

TABLE OF CONTENTS

	Page
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement	3
Reasons for Allowance of the Writ. .	6
Conclusion	12
Certificate of Service on Respondent.	14
Appendix --	
Opinion, District Court for the Southern District of Georgia	A1
Opinion, Eleventh Circuit Court of Appeals.	A34

TABLE OF CITATIONS

	Page
Bose Corp. v. Consumers Union of U.S., Inc., 104 S. Ct. 1949 (1984) . . .	9
L. & C. Marine Transport, Ltd. vs. Ward, 755 F.2d 1457 (11th Cir. 1985). . . .	1,5, 6,8,9, 10
St. Louis Testing Laboratories, Inc., v. Mississippi Valley Structural Steal Co., 375 F.2d 565 (8th Cir. 1967). . .	11
United States v. United States Gypsum Co., 333 U.S. 869 (1947).	7,8, 12
Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474 (1950)	11
W.R.B. Corp. v. Geer, 313 F.2d 750 (5th Cir. 1963).	10

STATUTES

28 U.S.C. § 1254(1).	1
Fed. R. Civ. P. 52(a).	1,6, 7,12

OPINIONS BELOW

The unpublished finding of the Federal District Court for the Southern District of Georgia was entered on March 23, 1984 and is reproduced in Appendix A at pages A1-A34. The opinion of the Court of Appeals For The Eleventh Circuit is reported at 755 F.2d 1457 (11th Cir. 1985) and is reproduced herein starting at page A-34.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on March 22, 1985. (App. A, p. 1). A timely petition for en banc consideration was filed and denied on April 25, 1985. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 52(a)

"RULE 52.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and

state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT

This action began as suit for damages under the Longshoreman Harbor Workers' Compensation Act (LHWCA) for injuries sustained while petitioner Ward was engaged in longshoreman operations on board the Motor Vessel Oswego Planter. Shortly after suit was filed, the owners and operators of the Motor Vessel Oswego Planter petitioned the Federal District Court in the Southern District of Georgia for exoneration from or limitation of liability. Pursuant to the rules governing exoneration proceedings, a showing of the evidence was made to the bench, with the Federal Judge making certain findings of fact and conclusions of law.

During the proceeding, the petitioner introduced evidence which showed that he was injured on May 26, 1981 by a flailing steel cable when a cargo boom on board the Motor Vessel Oswego Planter collapsed. Petitioner suffered the amputation of both his feet.

Petitioner has contended and continues to contend that a large green cable storage box made of wood was negligently placed on the deck's work space, preventing petitioner's only access for escape from the flailing steel cable.

Evidence adduced during the exoneration proceeding showed that the Motor Vessel Oswego - Planter's Chief Officer, with the Respondent's permission, designed, constructed, and installed the box for cable storage (T. 39, 124) Furthermore, the location of the box was selected by the Chief Officer, and it was placed in such a manner and at such an angle to limit the work area of petitioner Ward. (T. 126) As the incident which led to the severing of petitioner's feet happened, petitioner testified that he attempted to move clear of the flailing cable, but was prevented from doing so since the green wooden box blocked his only route of a safe escape (T. 391). This testimony was corroborated by the Respondent's own expert witness (Mr. Jennings),

who verified that petitioner Ward could have escaped if the box had not been there. (T. 245)

Despite the uncontroverted evidence as to the positioning of the green wooden box, the District Court Judge exonerated the owners and operators of the Motor Vessel Oswego Planter from liability, concluding that:

> "The presence of the wooden box near the foot of the mast in no way related to the falling of the boom nor did it prevent Ward's escape from the flying bull wire." (R. 1154) (emphasis added).

This conclusion was affirmed by the Eleventh Circuit Court of Appeals, in which the erroneous assumption was reached that "other avenues of escape were available":

> "Although the box may have impeded Ward's flight in one direction, it appears that other avenues of escape were available." L. & C. Marine Transport, Ltd. vs. Ward, 755 F.2d 1457, 1462 (11th Cir. 1985).

However, it was stated in uncontroverted evidence that the large green box blocked Ward's only route of safe escape. (T. 391)

In their affirmance of the District Court's findings, the Court of Appeals refused to hold that the District Court's findings were 'clearly erroneous.' L. & C. Marine Transport Ltd., supra, 755 F.2d at 1462. En banc consideration of this issue was thereafter denied on April 25, 1985. L. & C. Marine Transport, Ltd. v. Ward, 755 F.2d 1457 (11th Cir.) en banc consideration denied 760 F.2d 698 (1985).

REASONS FOR ALLOWANCE OF THE WRIT

I.

In reviewing the correctness of the District Court's exoneration findings, Federal Rule of Civil Procedure 52(a) sets out the 'clearly erroneous' test for the Appellate Court to employ in determining whether error was committed by the District Court Judge. Succinctly stated, this rule allows the reviewing Appellate Court, on appeal, to overturn a District Court's findings

of fact if found to be clearly erroneous.[1]

In United States v. United States Gypsum Co., 333 U.S. 869 (1947), this Court reasoned that "since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'" U.S. Gypsum, supra, 333 U.S. at 396. Further this Court defined "clearly erroneous" as follows:

> A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence

---

1. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed. R. Civ. P. 52(a)

is left with the definite and firm conviction that a mistake has been committed. U.S. Gypsum, supra 333 U.S. at 396.

II.

The decision of the Eleventh Circuit stands in direct contravention to the standards set forth in U.S. Gypsum. In their decision, the Eleventh Circuit recognized the uncontroverted evidence pertaining to the green wooden box:

> ". . . the appellants cite the testimony of Ward, who stated that the box did prevent his escape, and the testimony of the appellees' own expert witness, Captain Jennings, who testified that if the box had not been present, Ward could have escaped." L. & C. Marine Transport Ltd., supra, 755 F.2d at 1461-62.

Despite this, the Eleventh Circuit refused to determine that the District Court finding was clearly erroneous and, indeed, reached a conclusion to the contrary:

> After examining the full record, however, we are not convinced that the district court's findings are clearly erroneous. Although the box may have impeded Ward's flight in one direction, it appears that other avenues of escape were available. Id., supra, at 1462.

In fact, the uncontroverted testimony revealed that there were no other avenues escape. (T. 391)

This Court has held such conclusions to be error since "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of U.S., Inc., 104 S. Ct. 1949, 1966 (1984). Further, since the entire record permits but one logical conclusion--that the large green box prevented Petitioner's escape--a conclusion to the contrary can only be described as 'clearly erroneous.'

III.

The Eleventh Circuit has rendered a

decision that is in conflict with the decisions of other Circuit Courts of Appeals. Specifically, the Eleventh Circuit held that:

> a finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. L. & C. Marine Transport, Ltd., 755 F.2d at 1461.

The Fifth Circuit uses a different standard in defining "clearly erroneous", however, in which the evidence is to be considered as a whole and the finding is to be set aside if the reviewing court is "left with the impression it is not the truth and right of the case." See W.R.B. Corp. v. Geer, 313 F.2d 750, 753 (5th Cir. 1963). Still, the Eighth Circuit employs a different standard in which that Circuit has said:

> We have no right to set aside a finding of fact of the trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the

evidence, or unless it was induced by an erroneous view of the law. St. Louis Testing Laboratories, Inc. v. Mississippi Valley Structural Steel Co., 375 F.2d 565, 567 (8th Cir. 1967).

Despite the various Circuits attempts to define 'clearly erroneous' these seemingly marginal distinctions that are employed by these Circuits should not be ignored. As Justice Frankfurter observed:

> The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.
>
> * * *
>
> But a standard leaving an unavoidable judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474, 490 (1950).

Petitioners therefore request this Court to establish a uniform and unambiguous standard by which all Courts of Appeals must follow to avoid confusion, uncertainty, and disharmony.

CONCLUSION

If allowed to stand, the decision of the Eleventh Circuit in the instant action will set a precedent that not only conflicts with U.S. Gypsum, but also states a definitional standard that is incongruous with other Circuits.

It is evident through case precedent that the various Circuit Court of Appeals apply different standards in defining Fed. R. Civ. P. 52(a)'s 'clearly erroneous' language and that this Court should clarify the scope of this situation.

For the above stated reasons, therefore, this Court should issue Grant the Writ of Certiorari and reverse the decision of the Eleventh Circuit or should set this case for briefs and argument.

Respectfully submitted,

LAW OFFICES OF BILLY E. MOORE

BY: Billy E. Moore
Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the above and foregoing documents upon all counsel in the within matter by mailing a copy of the same with proper postage affixed to insured delivery to:

Mr. Gustave R. Dubus
Post Office Box 9523
Savannah, Georgia 31412

Mr. Edward T. Brennan
Post Office Box 2784
Savannah, Georgia 31402

This 31 day of July, 1985.

LAW OFFICES OF BILLY E. MOORE

BY: Billy E. Moore
Counsel for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

IN THE MATTER OF THE COMPLAINT OF L. & C. MARINE TRANSPORT LTD., OWNER, AND OSWEGO LATEX CARRIER CORP., OPERATOR, OF THE MOTOR VESSEL OSWEGO PLANTER, AND THE FIRESTONE TIRE & RUBBER COMPANY, STOCKHOLDER OF L. & C. MARINE TRANSPORT LTD., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	*	CV481-476

ORDER

This exoneration from or limitation of liability action was instituted by the following Plaintiffs: L. & C. Marine Transport, Ltd ("L. & C."), the owner of the Liberian Motor Vessel OSWEGO PLANTER; Oswego Latex Carrier Corporation ("Oswego Latex"), the operator of the M/V OSWEGO PLANTER under a contract with L. & C.; The Firestone Tire & Rubber Company ("Firestone"), the sole stockholder of L. & C. and the owner of most of the cargo aboard the OSWEGO PLANTER; Marine Transport Management, Inc., (formerly

known as Marine Transport Lines, Inc., ("MTL")), the subcontract operator of the OSWEGO PLANTER under an agreement with Oswego Latex; and Marine Transport Lines, Inc., (formerly known as General American Transportation International Finance Corporation ("GATIFC")), a parent corporation, separated by another corporate entity, of Oswego Latex and a parent corporation, separated by two other corporate entities, of MTL. The Claimants include Johnny Ward and Robert Freeman who seek damages for injuries allegedly arising out of the negligence of the Plaintiffs while Claimants were employed by Stevens Shipping & Terminal Company as longshoremen aboard the OSWEGO PLANTER at Savannah, Georgia on May 26, 1981, and Linda Ward who seeks damages in the nature of loss of consortium resulting from the alleged injuries to Johnny Ward. In addition, Claimant Reliance Insurance Company intervened to assert liens to recover workers' compensation payments and medical expense payments made to or on behalf of Johnny Ward and Robert Freeman.

A non-jury trial was commenced on January 30, 1984 at the close of which, on February 1, 1984, the Court granted Plaintiff's Motion for Involuntary Dismissal with respect to Firestone and Marine Transport Lines, Inc., formerly GATIFC. This ruling resulted from the Claimants' failure to present sufficient evidence for the Court to pierce the corporate veils of the two parent companies to impose upon them liability that allegedly existed on the parts of the subsidiary corporations. Remaining findings of fact and conclusions of law now follow.

FINDINGS OF FACT

1. The OSWEGO PLANTER, a general cargo ship, was constructed in Bergen, Norway in 1963 and was originally known as the NORBETH. In 1972, known as the OLD DOMINION STATE, this vessel underwent modifications which included the additions of tanks for the carriage of liquid latex and a 22 ton capacity jumbo boom to serve No. 6 Hold. The vessel also became known as the OSWEGO PLAINTER in 1972.

2. The OSWEGO PLANTER had six hatches with its bridge and crew accomodation (collectively house) aft. The hatches were numbered from 1 through 6 with No. 1 farthest forward and No. 6 directly in front of the house.

3. Between No. 5 and No. 6 hatches, there was a masthouse, the top of which is known as a mast table. This mast table was fitted with various equipment for use in handling cargo into and out of Nos. 5 and 6 Holds. From the masthouse projected a mast as well as two legs which sloped slightly inward and which formed the supports for a smaller platform.

4. The jumbo was affixed to the aft side of the mast. Each of the two legs had 5-ton capacity booms affixed to both their forward and aft sides, with the booms on the forward side serving No. 5 hatch and those aft serving No. 6 hatch. The four 5-ton booms and their related equipment were virtually identical.

5. The incident which gave rise to this action involved the falling from a nearly

vertical position to below horizontal of the 5-ton boom affixed to the aft side of the port or left leg of the mast, known as the No. 6 port boom, and also known in some of the ship's papers as No. 20 boom. For purposes of this action, it shall be referred to as No. 6 port boom.

6. On May 26, 1981 the date of the incident, the OSWEGO PLANTER was owned by L. & C. which had acquired it on March 4, 1980. At the time of the incident and for all relevant events preceding the incident, the operator of the vessel was Oswego Latex and the subcontract operator was Marine Transport Management, Inc.

7. During the relevant time period, the Chief Officer of the OSWEGO PLANTER was Rogelio A. Terron whose responsibilities included the proper maintenance of the cargo gear and the area in which the incident occurred. Terron held both Spanish and Liberian Master's licenses and had been a chief officer on the OSWEGO PLANTER since 1978, working four months on and four months off, in rotation with another chief officer.

Several months after the incident in question he became Master on the OSWEGO PLANTER.

8. James Pusateri, manager of marine operations for L. &. C. and Nicholas Orfanidis, fleet manager for MTL were the persons most responsible for the maintenance of the OSWEGO PLANTER within their respective organizations.

9. The OSWEGO PLANTER is classed by the American Bureau of Shipping (ABS), a society which certifies that the ships it classifies meet certain minimum standards. The OSWEGO PLANTER underwent its Annual Survey of Hull and Machinery by ABS in Baltimore, Maryland on May 22, 1981, just four days prior to the incident in question. The ABS surveyor recommended that the vessel be retained in class.

10. The cargo gear aboard the OSWEGO PLANTER is registered with the International Cargo Gear Bureau (ICGB), an international organization which inspects and certifies to the safety and good working condition of a ship's cargo gear.

ICGB is authorized by the U.S. Department of Labor to certify such gear for use in ports of the United States. The specific cargo gear involved in this action underwent both annual and quadrennial inspections by ICGB on March 14, 1981 in Baltimore, Maryland and was certified to be in safe working condition.

11. During sea voyages, the 5 ton booms are normally carried in a horizontal position with the upper end secured in a device called a boom cradle. On a voyage inbound to the United States, shortly before arrival in port, the ship's crew, on instructions from the Chief Officer, will raise the booms to near vertical positions to facilitate access to the holds for loading and unloading cargo. Before arrival in port, the Chief Officer also routinely inspects the ship's equipment and deck to assure that they are in good condition for the longshoremen.

12. The booms are raised and lowered as follows: A steel cable, known as the topping lift wire, runs through the head of the boom to

an unpowered winch, known as the topping lift reel, on the masthouse and is affixed by threading the other end of the wire (known as the bitter end or dead end) through a hole in the spool of the topping lift reel and clamping it to prevent its pulling out. Unreeling the topping lift wire allows the head of the boom to come down. Reeling in pulls it up. The spool of the topping lift reel is divided into two parts by a steel divider plate. By affixing another steel cable, known as the bull wire, to the spool on the other side of the divider plate and applying a source of power to move the bull wire, the boom can be raised or lowered depending upon whether one winds the bull wire onto the spool or unwinds it. The topping lift reel is equipped with a ratchet which rotates with the spool. When the boom is in the desired position, a locking bar, which operates by gravity, can be dropped into the teeth of the rachet, locking the boom in place. In order to raise or lower the boom, this locking bar must be lifted out of the teeth of

the ratchet. This locking bar, although sometimes referred to as a brake bar, is not intended for use in stopping or braking a falling boom.

13. Also on the masthouse are four electrically powered winches which provide power in loading and unloading cargo. Each winch is also fitted with a drum having the shape of a concave cylinder which rotates when the winch is operated. These drums are known as gypsies or gypsyheads. On the OSWEGO PLANTER, each gypsyhead has a slot through which cables can be passed and secured. The securing is normally by a shackle attached to the end of the bull wire which prevents the bull wire from pulling through the slot on the gypsy.

14. Each of the four booms on the OSWEGO PLANTER is supplied with a bull wire and shackle. When not in use, the bull wires, with the shackles affixed to one end, are coiled up and placed on the top of the topping lift reels.

15. The masthouse in question was also equipped with a wooden box which was used to store the wire for the jumbo boom and other loose items of cargo gear to keep the masthouse deck clear of these items. This box is not secured to the deck and can be moved about by several men as needed.

16. L. &. C. employed the OSWEGO PLANTER to carry certain cargo from Monrovia, Liberia to the United States and Mexico and to carry other cargo from the United States back to Monrovia. Its usual ports of call on this side of the Atlantic were Fall River, Massachusetts; Newport News, Virginia; Baltimore, Maryland; Savannah, Georgia; Veracruz, Mexico, and Houston, Texas.

17. On the voyage which preceded the incident in question, the 5-ton booms were kept in horizontal positions until they were topped to near vertical positions at Fall River, Massachusetts on approximately May 18, 1981, several days prior to the OSWEGO PLANTER'S arrival in Savannah

on May 25, 1981. No problems with the gear were encountered by the crew during these operations. General degreasing and cleaning of the vessel were done by the ship's crew on May 13 and May 15, 1981, prior to the arrival in Savannah.

18. Before the ship is turned over to the stevedore for cargo operation, Mr. Terron inspects the work area and gear to satisfy himself that they are safe. On the afternoon of May 25, 1981, prior to arrival in Savannah, he performed his routine visual inspection which included the masthouse in question. All gear was found to be in apparent good condition and the deck was clear.

19. Anticipating that the stevedore would follow normal procedures and use a shore crane to discharge the rubber that was stored in No. 6, Mr. Terron, on the morning of May 26, 1981, instructed the ship's boatswain to swing the booms around so that they would not interfere with the use of the shore crane. This did not

require operating any of the equipment involved in the accident but merely unsecuring a preventer wire and manually pulling the boom around with a guy wire, then resecuring the preventer wire. Mr. Terron observed this operation from his cabin window.

20. Stevens Shipping & Terminal Company (Stevens) was the stevedoring company employed to load and unload cargo from the OSWEGO PLANTER on the day in question and had in fact been so employed numerous times in the past. Stevens' stevedore foreman on the ship was H. L. Smith who had over twenty years of experience in loading and unloading ships. Smith assigned the various gangs of longshoremen to the ship's hatches where they were to work. Prior to the commencement of the work, Smith's normal procedure was to communicate with the Chief Officer to inform him of the specific hatches his gangs were to work. The ship's crew would open the hatch covers, and the longshoremen would rig the necessary equipment to

load or unload the cargo. The longshoremen had implied permission to use the ship's booms when necessary.

21. Any problems encountered with the ship's equipment by the longshoremen were to be communicated to Smith who in turn would relate the information to the Chief Officer. No complaints concerning the equipment or conditions on the OSWEGO PLANTER were received by Stevedore Smith or Chief Officer Terron on the morning of May 26, 1981 prior to the accident.

22. One of the gangs of longshoremen employed by Stevens and under Smith's supervision was headed by Jesse Jackson and included Claimants Johnny Ward and Robert Freeman, as well as Richard Wiggins. Jackson had worked as a longshoreman for over ten years, while each of the others had worked as longshoremen for at least five years prior to the incident in question.

23. Jesse Jackson's gang was originally assigned to unload ammonia modules carried on top

of and on deck near No. 5 hatch. Following that operation, the longshoremen were to move to No. 6 hatch to unload baled rubber. The discharge of the modules and the rubber were to be accomplished with the use of a shore crane leased from the Georgia Ports Authority. Just prior to the completion of the discharge of the modules, however, the shore crane broke down and the gang was instructed to rig the ship's booms for unloading the baled rubber from No. 6 hatch. No notice of this change in plan was communicated to Mr. Terron who was in his cabin with John Fishback, a marine surveyor, conducting calculations of the quantity of liquid latex discharged. Third Officer Pedro Gangoiti, the officer on watch at this time, was in the crew's mess, checking in new crew members who were just joining the ship.

24. Under the supervision of Jesse Jackson, Richard Wiggins and Claimants Ward and Freeman were to start the process of rigging the booms to

unload the rubber from No. 6 hatch. Wiggins tended the locking bar on the topping lift reel; Ward operated the winch; and Freeman handled the bull wire.

25. The longshoremen were aware of at least two methods of lowering the boom. The safest method, under the circumstances, and the one required by the Occupational Safety and Health Administration (OSHA), involved the use of a shackle to secure the bull wire to the gypsyhead. When this method is used, all the wire is wound onto the gypsy, leaving nothing on deck and the power winch serves as a brake. A shackle for the bull wire was present and other shackles were available from other bull wires, other parts of the ship and from the pier upon request of the stevedore, however, a shackle was not used to secure the bull wire to the gypsyhead nor was one requested. Rather, the longshoremen opted for the second method which involved taking a number of wraps of wire around the gypsyhead. All of

the wire was not wrapped around the gypsy, resulting in wire being left on deck and the only brake on the boom was Freeman who was holding the bull wire.

26. All of the ship's equipment utilized in lowering the No. 6 port boom, including the locking bar on the topping lift reel, the wire and the power winch, were operating properly prior to the accident and the work deck was clean. The longshoremen voiced no complaints to the stevedore or the Chief Officer about the equipment or deck conditions at that time.

27. During the course of lowering the boom, Ward apparently stepped away from his position at the winch control and was standing in or near the coils of bull wire on deck behind Freeman who was feeding the bull wire around the gypsy. Prior to the completion of the operation, Jackson ordered the lowering stopped so he could check the position of the boom. At this point, Wiggins was not instructed to put the locking bar in place.

The boom suddenly began to shake and the topping lift reel began to turn rapidly. Jackson then ordered the locking bar dropped and ordered Freeman to release the bull wire, effectively depriving the longshoremen of control over the boom.

28. As the boom fell, the bull wire was wound onto the topping lift reel at a high speed and in the process severed the feet of Ward and struck Freeman in the stomach. The topping lift wire pulled out of the topping lift reel when it reached its bitter end. At some point while the boom was falling, Wiggins either tried to engage the locking bar, or dropped it, and turned away to escape the flying bull wire. The locking bar did not engage in the teeth of the rapidly spinning ratchet wheel. The teeth of the ratchet wheel suffered considerable mashing damage and the tips were flattened by the locking bar as the ratchet rotated and repeatedly struck the falling bar. The locking bar itself was bent in the middle and the endplates of the bar bowed inward

due to the forces of the teeth hitting the bar on its ends.

29. The presence of the wooden box near the foot of the mast was in no way related to the falling of the boom nor did it prevent Ward's escape from the flying bull wire.

30. Chief Officer Terron was just coming on deck at the time the boom fell and heard a rapid clanking noise which apparently was the locking bar repeatedly falling and being knocked back up by the rapidly rotating ratchet wheel. He also saw the boom strike the main deck rail. He then heard the commotion resulting from the injuries sustained by Ward and Freeman on the masthouse. He and surveyor Fishback immediately climbed to the masthouse where Terron took the lead in rendering aid to Ward. He sent for tourniquets to stop the bleeding, towels and blankets, and ice to preserve the severed feet. He then helped with arrangements to have Ward lifted off the ship to await an ambulance and stayed with him until the ambulance arrived.

31. After the injured men were taken to the hospital, Terron returned to the masthouse in the company of a stevedore safety superintendent. There he found the scene substantially the same as demonstrated in the photographs taken less than two hours later by Rolla Willhoit, a commercial photographer employed by the ship's attorneys. These photographs show the bull wire lying on deck with a shackle affixed to its end.

32. On instructions from Terron, the accident scene was left undisturbed, except for the moving of the fallen boom from across the main deck rail to a position with its head resting on the main deck, until the scene could be examined by experts retained by the ship's lawyers.

33. Richard Barch, a crane rigging engineer with an OSHA certificate authorizing him to certify floating cargo gear, conducted inspections of the accident scene on the afternoon of May 26, 1981 and on the following day. Harry Jennings, a marine surveyor with personal experience as a seagoing officer, examined the accident

scene on May 27, 1981. Both of these experts conducted tests of the OSWEGO PLANTER's No. 6 port winch and found it to be working properly.

34. Barch and Jennings examined the topping lift wire and concluded that the clamp used to secure the wire to the topping lift reel and the wire seizing used to bind the bitter end of the wire were stripped from it when the bitter end was pulled out of the spool of the topping lift reel as a result of the boom falling. No breaks or defects were observed in the bull wire with the exception of one kink which was believed to have been the direct result of the accident.

35. Barch and Jennings examined the topping lift reel and concluded that the locking bar was bent and the teeth of the ratchet wheel mashed as a result of the bar being repeatedly struck by the teeth of the ratchet wheel. George Aseff, a metallurgist and expert on accident reconstruction involving metals, concurred with this opinion. The Court credits the testimony of these experts.

36. Clyde Leavitt, a marine surveyor who testified on behalf of the Claimants, visited the OSWEGO PLANTER when it was docked in Orange, Texas in the summer of 1982, a full year after the accident had occurred. Based on hypotheticals presented to him by Claimants' attorneys, Leavitt opined that a bent and stiffly operating locking bar on the topping lift reel, kinked and greasy bull wire, and limited work space would have been substantial factors in causing an accident such as the one which occurred aboard the OSWEGO PLANTER on May 26, 1981. He further testified that the method for lowering the boom chosen by the longshoremen which involved taking turns of the bull wire around the gypsy was more "seaman-like" than the method required by OSHA in which a shackle is utilized to secure the bull wire to the gypsy. It was his opinion that the OSHA regulations were written by "some office bureaucrat" and were not technically very good. He did admit that "if the wire had been spooled up on the warping head as recommended by OSHA,

the accident as it happened would not have occurred." The Court does not credit the testimony of this witness.

37. Pusateri of L. &. C. and Orfanidis of MTL were the persons most responsible for the maintenance of the OSWEGO PLANTER within their respective organizations. Neither had knowledge of any of the conditions alleged to have caused the accident.

ULTIMATE FINDINGS OF FACT

1. The Claimants, Ward and Freeman, as well as Jackson and Wiggins, were very familiar with the boom rigging system on the OSWEGO PLANTER. No hidden dangers were present. Warning devices or signs would not have prevented the accident.

2. The ship's equipment which was utilized in the lowering of the No. 6 boom was in proper working condition prior to the accident. The size of the available work space was sufficient for the operations to be performed and the deck was clean.

3. A shackle was present which could have been used to secure the bull wire to the gypsy-head and numerous other shackles were available upon request. The longshoremen, with knowledge of and prior experience in the use of a shackle in lowering the boom, opted for an alternate method of lowering the boom which did not involve the use of a shackle. The Chief Officer had no knowledge of the method chosen by the long-shoremen, and none of the ship's crew participated in this operation.

4. The bowing inward of the sideplates of the locking bar, the middle bend in the locking bar, and the damaged teeth on the ratchet wheel directly resulted from the accident rather than being causative factors of the accident.

5. The proximate cause of the accident was the failure of the longshoremen to shackle or secure the bull wire to the gypsy, clearly the safest method and the one required by OSHA, coupled with their failure to take the safety precaution of engaging the locking bar when

Jackson ordered that the lowering of the boom be stopped in order to check the boom's position. Had these actions been taken, the accident would not have occurred. Further, the testimony suggested that the longshoremen's failure to unsecure the cargo runner before lowering the boom may have resulted in the creation of extreme tension on the cargo runner which would then have been transmitted to the bull wire which Freeman was attempting to hold.[1]

CONCLUSIONS OF LAW

The Claimants in this action allege that the accident in which their injuries were sustained was soley or substantially caused by negligence on the part of the shipowner. Specific acts of negligence asserted include 1) the supplying of

1. Evidence tendered in this regard was too scant to enable the Court to conclusively find that this negligence in failing to unsecure the cargo runner was a contributing cause of the accident. The evidence was sufficient to enable the Court to conclude that the negligent failure to use a shackle and to engage the locking bar were direct causes of this accident.

defective equipment (bull wire and locking pawl bar) to be used in the cargo operations by the longshoremen, 2) the supplying of a limited and unclean work area, 3) a failure to warn of these defective conditions, 4) a lack of supervision of the cargo operations by one of the ship's officers, 5) a failure to leave the cargo gear rigged up for use by the longshoreman in their cargo operations, and 6) the absence and unavailability of a shackle with which the bull wire could be secured to the gypsy.

Plaintiff's primary response to these allegations is that the shipowner was not in fact negligent, a finding which would entitle them to exoneration from liability in this case. Even assuming, however, that negligent conditions existed on the ship prior to the accident, Plaintiffs submit that none of those alleged conditions involved matters which would have been within the privity and knowledge of the shipowner. Thus, in this alternative, Plaintiffs contend they would be entilted to a limitation of

liability to the amount or value of the shipowner's interest in the vessel.

I. LIMITATION OF LIABILITY

The statutes permitting a shipowner to limit his liability for voyage and disaster debts, in event of a casualty, to the amount or value of his interest in the vessel were enacted in this country in 1851 to encourage investments in this country's shipping industry. Similar laws had existed in European countries for centuries. An investor might have been willing to risk the loss of his capital investment in a vessel resulting from the hazards of a voyage from England to India in the eighteenth century, but he was unwilling to be exposed to the almost limitless liability for damages sustained by crew members, cargo owners, and owners of other vessels resulting from the negligent operation of his vessel by persons over whom he had little or no control. Because of these and similar exposures, owners were permitted to surrender the vessel or its value and all profits from the

voyage, in payment of all claims arising from a casualty, in exchange for their liability being limited to the value of the vessel and its voyage profits. Rodco Marine Services, Inc. v. Migliaccio, 651 F.2d 1101, 1103 (5th Cir. 1981); Gilmore and Blac, The Law of Admiralty (2d ed. 1975, § § 10-1 to 10-3.

Plaintiffs' limitation of liability claim is brought pursuant to 46 U.S.C. § 183 which provides that the shipowner's liability shall be limited to the "value of the interest" of the "vessel and her freight" for any act which occurs "without the privity or knowledge" of the owner.[2]

---

2. 46 U.S.C. § 183(a) provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Complaint of Bankers Trust Co., 651 F.2d 160, 169 (3d Cir. 1981), reh. and reh. en banc den. In ascertaining whether a particular shipowner is entitled to limitation, the Court must first determine which act or acts of negligence or conditions of unseaworthiness caused the injury. The Court then determines whether the shipowner had knowledge or privity of these specific acts or conditions. In Re Brasea, 583 F.2d 736, 738 (5th Cir. 1978); Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10 (5th Cir. 1976). Knowledge or privity of any fact or act causing the accident is not enough for denial of limitation; it is only knowledge or privity of negligent acts or unseaworthy conditions which trigger a denial of limitation. Farrell Lines, at 10. In regard to this knowledge or privity requirement, corporate shipowners are held liable for the acts or knowledge of managing officers or supervisory employees. Bankers Trust, at 169. Usually, however, they will not be held liable for the

actions of crew members in the navigation or operation of the ship at sea. Id. And, although the petitioner in limitation bears the burden of proving lack of privity or knowledge, the initial burden of proving negligence or unseaworthiness rests with the injured claimants. Farrell Lines, at 10; In Re Brasea, at 783.

In the instant case, Claimants did not carry their burden of proving negligence or unseaworthiness on the part of the Plaintiffs.[3] Moreover, Plaintiffs proved that the acts of negligence which did cause the accident were those of the longshoremen and could not have been within the privity or knowledge of the Plaintiffs. Limitation is proper in this case.

II. EXONERATION FROM LIABILITY

Plaintiffs' claim for exoneration from all liability is premised on the theory that they

---

3. Because Claimants' negligence claims will be fully addressed in the next section of this opinion, the Court need not be elaborate on those claims at this point.

were free from any negligence in this case and that the accident was proximately caused by the negligence of the longshoreman in failing to shackle the bull wire to the gypsy as required by OSHA and in failing to engage the locking pawl bar when Jackson ordered that the lowering of the boom be stopped. After thoroughly reviewing all the testimony and evidence submitted in this case, the Court concurs with Plaintiffs' views.

The law which governs a shipowner's duty to longshoremen working on board a vessel has been interpreted by the United States Supreme Court in Scindia Steam Navigation Co. v. Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981). The facts in Scindia involved a longshoreman who was injured while working in the ship's hold when he was struck by cargo that fell from a pallet being held in suspension by a winch that was part of the ship's gear and was being operated by another longshoremen. The winch's braking mechanism allegedly had been malfunctioning for two days

preceding the day of the accident, but there was a dispute as to whether the cargo fell because the suspended pallet was swinging back and forth or because the braking mechanism slipped while the pallet was suspended, and as to whether the shipowner knew or should have known of the alleged condition of the winch. The injured longshoreman brought suit against the shipowner under § 5(b) of the Longshoreman's and Harbor Workers' Compensation Act (Act) as amended in 1972, 33 U.S.C. § 905(b), which provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void ... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be

> exclusive of all other remedies against the vessel except remedies available under this chapter.

The District Court granted summary judgment for the shipowner, holding that under the negligence standards governing liability under § 905(b), a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore is in exclusive control of the work, and that even if the shipowner knew or should have known of the defective winch, a shipowner has no duty to warn the stevedore or his employees of open and obvious defects. The Court of Appeals reversed, holding that under the proper standard, the shipowner had a duty to continue to inspect conditions of the vessel even if it had been turned over to the stevedore in safe condition, and that if dangerous conditions subsequently developed, in light of the vessel's practical opportunities to discover and remedy the dangers, failure to do so could be negligence. Concluding that there were several material facts in dispute that were for a jury to

resolve, the court remanded the case for further proceedings. The Supreme Court affirmed the Circuit Court's judgment, but set forth a different interpretation of the governing law.

The Supreme Court pointed out that the 1972 Amendments to the Act changed the prior scheme of things in several ways: the compensation payments due the longshoremen from the stevedore for injuries incurred in the course of his employment were substantially increased; the longshoreman's right to recover for unseaworthiness was abolished; his right to recover from the shipowner for negligence was preserved in § 905(b), which provided a statutory negligence action against the ship; and the stevedore's obligation to indemnify the shipowner if the latter was held liable to the longshoreman was abolished. Scindia, at 165. Section 905(b) did not specify, however, the acts or omissions of the vessel that would constitute negligence. Id.

The Supreme Court held that the vessel's duty to the stevedore and his longshoremen employees[4]

> ... extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that

---

4. Supreme Court's holding in Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 415 (1969) set forth vessel's duty of exercising due care "under the circumstances."

> are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and workspace to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Scindia, at 167. The vessel may also be liable, once cargo operations have begun, if it "actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active

control of the vessel during the stevedoring operation." Id.

In the absence of the active involvement of the vessel, once cargo operations have begun, the duty of the shipowner to the longshoremen is limited according to the Court:

> We are of the view that absent contract provision, positive law, or custom to the contrary ... the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless

> liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Scindia, at 172. The court prefaced this conclusion by citing Section 41 of the Act, 33 U.S.C. § 941, which "requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen.[5]

Scindia, at 170.

---

5. Title 33 U.S.C. § 941 provides in relevant part as follows:

> (a) ... Every employer shall furnish and maintain employment and place of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary

The next step in the Court's analysis concerns a more difficult issue: What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman? Scindia, at 172, 173. The court's view, that case, was that the stevedore's judgment in continuing to use the winch despite its malfunctioning may have been so "obviously improvident" that the shipowner, if it knew of the defect and that the stevedore was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the winch. The same would be true if the defect existed from the outset and the shipowner must be deemed to have been aware of its condition. Scindia, at 175, 176.

At the close of the majority opinion, the Court noted that determinations had not been made

whether the winch was defective or if it was, when it became defective and whether the defect contributed to the accident, Scindia, at 179 n.26, and concluded: "If the effective cause was a simple act of operational negligence by the crane operator or the hatch tender, the vessel would not be liable in any event." Id.

With Scindia's legal principles in mind, this Court will now address Claimants' assertions that Plaintiffs, through their specific acts of negligence, violated certain duties owed to the stevedore and longshoremen and that these acts of negligence caused or substantially contributed to the accident which occurred on the OSWEGO PLANTER on May 26, 1981.

A. DUTY TO PROVIDE A SAFE WORK PLACE

Claimants contend that this first require-

---

may determine by regulations or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees.

ment of Scindia was violated because the ship's equipment and work area to be used by the longshoremen in lowering the the (sic) No. 6 port boom were defective when supplied. Further, Claimants assert that Plaintiffs violated their duty to warn of these defective and unsafe conditions.

Claimants Ward and Freeman, as well as longshoremen Wiggins and Jackson, testified that the locking bar of the topping lift reel was rusty, bent, and inoperative; that the bull wire was very kinked, greasy, and rusty; that a shackle was not present or available; and that the work space was cluttered with the bull wire, too limited in size and greasy when they went on deck to rig the No. 6 port boom. It was also suggested that the ship's crew should have insured that the boom was rigged prior to the beginning of the stevedore's cargo operations. The longshoremen considered these conditions to be unsatisfactory when noted, however, they

voiced no complaints to the stevedore, H. L. Smith or to any of the ship's officers. Subsequent to the accident, these conditions were considered to be the causative factors of the accident by the longshoremen and their expert, Leavitt.

Following thorough and repeated reviews and analyses of the testimony and evidence submitted during trial, the Court is convinced that the ship's equipment and work space were not defective or unsafe prior to the accident as claimed by the longshoremen and, accordingly, did not cause or contribute to the accident. It naturally follows that Plaintiffs had no duty to warn the stevedore of conditions which were not defective or unsafe.

The vessel's cargo gear, including the No. 6 port boom, was inspected and certified by the ICGB on March 14, 1981, some 2 1/2 months prior to the incident. Mr. George White, an expert marine engineer and a principal representative of the ICGB since 1967, testified that his

inspection of the ship's equipment included the winches, cargo booms, the topping lift wire, fittings on the boom, the shackles, the topping lift winches and foundations of that equipment. He specifically examined the wires for excessive corrosion, breaking and kinks. It was Mr. White's opinion that the system for lowering the No. 6 port boom on the OSWEGO PLANTER was perfectly adequate to do the job intended, that it was safe to operate and was not substandard or obsolete. The cargo equipment was inspected and certified by the ABS on May 22, 1981, just four days prior to the incident. In accord with the ICGB inspection, the ABS inspection revealed no deficiencies in the OSWEGO PLANTER's No. 6 port boom.

Chief Officer Terron, who was responsible for the maintenance of the OSWEGO PLANTER, testified that he had personally inspected the ship's equipment on May 25, 1981, the day before arrival in Savannah. Nothing was found to be out of order. Neither Terron nor Stevedore Smith

were aware of any defective or unsafe conditions involving the No. 6 port boom prior to the accident or during the cargo operations. Mr. Orfanidis, fleet manager for MTL, testified that he had no knowledge of any defects existing in the OSWEGO PLANTER's equipment which was used to lower the No. 6 port boom. Mr. Pusaterie, manager of marine operations for L. & C., testified in the same vein.

Plaintiffs' experts, Jennings, Barch and Aseff, opined that the locking bar was bent and made inoperable and that its side plates were bowed inward as a direct result of the accident. This testimony was supported by photographs which were taken within a short time following the accident and which showed the mashed teeth of the rachet wheel which had continuously hit against the ends of the locking bar as the boom was falling. Substantial evidence was submitted to establish that the work space was adequate and clean and did not contribute to the accident. Also presented was considerable evidence to

demonstrate the presence of a shackle on the bull wire and the presence and availability of numerous other shackles. It was undisputed that had a shackle been used to secure the bull wire to the gypsy, all the bull wire would have been wound onto the gypsy, leaving the deck clear of such wire. This method of rigging the boom, while known and available to the longshoremen, and required by OSHA, was not the method chosen.[6] Nor were the stevedore or ship's officers made

---

6. 29 CFR § 1918.54(e) provides:

> (1) Where a bull wire is taken to a gypsy head for the purpose of lowering or topping a boom, the bull wire shall be secured to the gypsy head by shackle or other equally strong method. Securing by fiber rope fastening will not be considered adequate.
>
> (2) When, in lowering or topping a boom, it is not possible to secure the bull wire to the gypsy head, or when the topping lift itself is taken to the gypsy head, sufficient turns, in no case less than five (5), shall be used.

Under the facts of this case, subsection (2) was inapplicable since a shackle was available and the topping lift was not taken to the gypsy.

aware that this method was not to be used. Finally, the ship had no duty to insure that the boom remained rigged for the longshoremen's cargo operations and the ship's crew took no active part in these operations.

In accord with the Supreme Court's ruling in Scindia, this Court holds that Plaintiffs fulfilled their duty to have the OSWEGO PLANTER and its equipment in such condition that the stevedore and longshoremen could carry on cargo operations with reasonable safety. There existed no defective conditions or hidden dangers of which to warn. See Scindia, at 166, 167; see also Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd., 394 U.S. 404 (1969); Duplantis v. Zigler Shipyards, Inc., 692 F.2d 372 (5th Cir. 1982); Pluyer v. Mitsui O.S.K. Lines, Ltd., 664 F.2d 1243 (5th Cir. 1982); Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981); Walker v. Blacksea S. S. Co., 637 F.2d 287 (5th Cir. 1981); Stass v. American Commerical Lines, Inc., 683 F.2d 120 (5th Cir. 1982); Albergo v. Hellenic

Lines, Inc., 658 F.2d 66 (2d Cir. 1981); Bandeen v. United Carriers (PaNAMA), Inc., 712 F.2d 1336 (9th Cir. 1983); Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981); Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982); Hedric v. Daiko Shoji, 1983 A.M.C. 2868 (9th Cir. 1983); McCullough v. S/S Coppename, 1983 A.M.C. 2547 (E.D.La. 1982).

B. DUTY TO SUPERVISE OR INTERVENE

While the thrust of Claimants' allegations is on the negligence of Plaintiffs in providing defective equipment and an unsafe work area to be used by the longshoremen in unloading the cargo aboard the OSWEGO PLANTER, Claimants also suggest that it was incumbent upon the shipowner to provide "supervision by a designated deck officer of the cargo loading operations." This alleged duty simply did not exist in this case.[7]

---

7. Claimants do not allege, nor does the evidence support, that the shipowner or the ship's crew took any active part in the cargo operations.

The Supreme Court in Scindia made clear that, once the stevedore's cargo operations have begun, absent contract provision, positive law, or custom to the contrary, the shipowner has no general duty under § 905(b) by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The shipowner, within limits, is entitled to rely on the stevedore and is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. Scindia, at 172. The Eleventh Circuit recently indicated that the exception to this general absence of a duty of the shipowner to act once cargo operations have begun requires a two-fold determination: the potential duty to discover unknown dangers, and the potential duty with respect to dangers which are known to the shipowner. Hunter v. Reardon Smith Lines, Ltd., 719 F.2d

1108, 1112 (11th Cir. 1983). That court interpreted Scindia to mean that the shipowner has no general duty to discover unknown dangers. With respect to dangers which are known to him, however, the shipowner may have a duty to intervene if the stevedore's judgment in continuing the cargo operations appears so "obviously improvident" that the known defect presents an unreasonable risk of harm to the longshoremen. Id., at 1112. See also Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir. 1983); Hill v. Texaco, 674 F.2d 447 (5th Cir. 1982); Ducote v. International Operating Co. of La., Inc., 678 F.2d 543 (5th Cir. 1982); Moser v. Texas Trailer Corp., 694 F.2d 96 (5th Cir. 1982); Harris v. Reederei, 657 F.2d 53 (4th Cir. 1981); Davis v. Partenreederei, 657 F.2d 1048 (9th Cir. 1981); Sarauw v. Oceanic Navigation Corp., 655 F.2d 526 (3d Cir. 1981); Gill v. Hargo Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982); Bonds v. Mortenson and Lange, 717 F.2d 123 (4th Cir. 1983); Woodruff v.

United States, 710 F.2d 128 (4th Cir. 1983); Hellenic Lines v. Brown, 168 Ga. App. 677 (1983).

The dangers that arose in this case flowed directly from the operational negligence of the longshoremen in failing to use a shackle to secure the bull wire to the gypsy and failing to engage the locking bar. These acts were unknown to the shipowner, the ship officers, and the ship's crew, and were acts which were solely in the control of the stevedore and longshoremen. Under no legal theory, could the ship be neld liable for that negligence.

The Court concludes this opinion by expressing sympathy for the Claimants and, in particular, Claimant Ward for the injuries sustained in this most tragic accident. The Court, however, is compelled to apply to the facts of this case, the governing law in this area as interpreted by the United States Supreme Court in Scindia. However severe the injuries may be, the Court is not free to visit liability

for these injuries upon the Plaintiffs who displayed no acts of negligence which caused or contributed to this unfortunate incident. The Claimants must bear the burden for their own negligent actions.

Plaintiffs' Petition for Exoneration from or Limitation of Liability is granted in toto.

SO ORDERED, this 23 day of March, 1984.

JUDGE, UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT OF
GEORGIA

L & C MARINE TRANSPORT, LTD. v. WARD

L & C MARINE TRANSPORT, LTD., et al., Plaintiffs-Appellees,

v.

Johnny WARD, Linda Ward, and Robert Freeman, Claimants-Appellants.

No. 84-8303

United States Court of Appeals, Eleventh Circuit

March 22, 1985

Cargo companies petitioned for exoneration from or limitation of liability in response to longshoremen's suit in state court to recover for personal injuries sustained while preparing to unload cargo vessel, and longshoremen then appeared as claimants in the federal court proceedings and sought to prove cargo companies negligent. The United States District Court of the Southern District of Georgia, B. Avant Edenfield, J., entered summary judgment exonerating the cargo companies, and longshoremen appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) district court's findings

of fact rejecting longshoremen's propounded factual bases for liability and finding instead that the accident resulted directly from operational negligence of the longshoremen were not clearly erroneous, and (2) district court's admission of shipping inspection certificate and refusal to reopen discovery despite failure of cargo companies to comply with rules of discovery and deliver inspection certificate when requested, even if improper, were harmless.

Affirmed.

Before JOHNSON and CLARK, Circuit Judges, and LYNNE*, District Judge.

JOHNSON, Circuit Judge:

Appellants brought suit in the Superior Court of Chatham County, Georgia, to recover for personal injuries sutained while preparing to unload the OSWEGO PLANTER, a cargo vessel owned

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

by appellee L & C Marine Transport Limited[1] and operated by appelle Oswego Latex Carrier Corporation. In response, the appellees instituted this action in the United States District Court for the Southern District of Georgia, petitioning for exoneration from or limitation of liability. The appellants then appeared as claimants in the federal court proceedings and sought to prove the appellees negligent. After a bench trial, the district court entered summary judgment exonerating the appellees, and this appeal ensued. We affirm.

---

1. Firestone Tire & Rubber Company, of which L & C Marine is a wholly-owned subsidiary, was also joined as a defendant in the superior court action and appears as an appellee in this case. The district court dismissed Firestone as a party to the litigation after finding that the appellants had failed to present sufficient evidence to pierce the corporate veil of L & C Marine. The appellants catalogue here several items of evidence purporting to show Firestone's direct control of L & C Marine. Because we hold that L & C Marine was properly exonerated from liability, the appellants' challenge to the dismissal of Firestone becomes a moot issue.

I. FACTS

Johnny Ward and Robert Freeman were injured by a flailing steel cable while attempting to rig one of the OSWEGO PLANTER's cargo booms. Use of the boom had become necessary when the shore-based cargo equipment rented from the port authority broke down. Having performed similar operations on numerous prior occasions, Ward and Freeman were familiar with the task of rigging and operating the cargo boom, and were authorized to use the vessel's equipment if necessary.

The accident occurred atop a platform from which the workers could operate four five-ton cargo booms, as well as a twenty-two-ton boom that had been added to the OSWEGO PLANTER in 1972. Ward and Freeman were injured when they attempted to lower one of the five-ton booms. The boom is lowered by a steel cable called the "topping lift wire." One end of the topping lift wire is attached to the free end of the cargo boom. The cable is then threaded through a

pulley high on the ship's mast and connected by a clamp to a non-powered winch (called the "topping lift reel") located at the base of the mast. The boom is raised and lowered by spooling the topping lift wire on and off the topping lift reel.

The source of power for raising and lowering the boom is applied through a second steel cable (called the "bull wire"), which is connected to a powered winch that rests on the platform a few feet away from the topping lift reel. When fully rigged, the bull wire runs directly from a circular drum on the powered winch (called the "gypsy head") to the topping lift reel, separated on the reel from the topping lift wire by a circular steel divider plate. To raise the boom, the powered winch is operated so that the bull wire spools from the topping lift reel onto the gypsy head and the the topping lift wire is spooled onto the reel. The boom is lowered by gravity when the powered winch is operated so

that the bull wire spools from the gypsy head to the topping lift reel and the topping lift wire spools off the reel.

Cargo ships customarily enter port with their cargo equipment fully rigged and their booms in an upright, or "topped," position. In this instance, however, the OSWEGO PLANTER's chief officer had ordered the bull wire removed from the gypsy head so that the powered winch could be used in an unrelated operation. The section of the bull wire removed from the gypsy head was left loosely coiled on top of the topping lift reel. A locking bar designed to catch, when dropped, the teeth of two ratchet wheels found on either end of the topping lift reel held the cargo boom in its topped position. Thus, when Ward and Freeman mounted the platform, their first task was to re-attach the bull wire to the gypsy head.

According to federal safety regulations, "the bull wire shall be secured to the gypsy head

by shackle or other equally strong method." 29 C.F.R. § 1918.54(e)(1). Ward and Freeman did not employ a shackle, for that would have necessitated finding and attaching the end of the bull wire to the gypsy head and then operating the powered winch until all of the loose cable was wound onto the gypsy head. Rather, they chose to make several wraps around the gypsy head from somewhere in the middle of the bull wire, leaving the remainder on the floor of the platform. As the boom was being lowered, Freeman was to guide by hand the remainder of the bull wire onto the gypsy head. Ward was to operate the powered winch, and a third worker was to disengage the locking bar and hold it up.

After lowering the cargo boom a short distance, the workers stopped to check its position. The locking bar was not engaged. The boom began to shake and fall. Freeman could not hold on to the bull wire against the weight of the falling boom. He let go, and as the boom fell the

topping lift wire spooled off the topping lift reel so fast that when it reached its end the clamp was snatched off. Simultaneously, the bull wire was spooled off the floor, around the gypsy head, and onto the topping lift reel with increasing speed. The flying bull wire severed Ward's feet from his body and struck Freeman in the abdomen.

The appellants propound three factual bases for liability, each of which is grounded upon the legal duty of the appellees to turn over the cargo vessel and its equipment to the longshoremen in such condition that expert and experienced workers will be able, by the exercise of reasonable care, to carry on cargo operations with reasonable safety. Scindia Steam Navigation Co. v De Los Santos, 451 U.S. 156, 167 101 S.Ct. 1614, 1622, 68 L.Ed.2d 1 (1981); Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 416, 89 S.Ct. 1144, 1151, 22 L.Ed.2d 371 (1969). First, the appellants contend that the workspace on the

platform was inadequate due to the presence of a wooden box used to store cables and accessories for the cargo booms. In particular, Ward claims that the placement of the box prevented his escape from the flailing bull wire. Second, the appellants claim the locking bar was rusted and bent, making it inoperable and resulting in its failure to stop the falling cargo boom. Third, the appellants argue that the appellees' failure to deliver the OSWEGO PLANTER to the longshoremen with its cargo gear fully rigged constituted negligence and was a substantial factor in causing their injuries.

The district court rejected these arguments and found instead that the accident resulted directly from the operational negligence of the longshoremen in failing to use a shackle to secure the bull wire to the gyspy head and in failing to engage the locking bar while checking the position of the boom. Detailed federal safety regulations require that a shackle be

employed, when one is available, to connect the bull wire to the gypsy head.[2] The district court found in this case that at least one shackle was present on the platform and other shackles were available elsewhere on the ship. This finding is not challenged on appeal. Had the bull wire been shackled, concluded the district court, all of the loose cable would have been wound around the gypsy head and the powered winch would have served to brake the falling boom. Alternatively, had the locking bar been engaged when the lowering operations were halted, control of the boom would not have been lost.

---

2. The regulations state:

> (1) Where a bull wire is taken to a gypsy head for the purpose of lowering or topping a boom, the bull wire shall be secured to the gypsy head by shackle or other eqally strong method. Securing by fiber rope fastening will not be considered adequate.
>
> (2) When, in lowering or topping a boom, it is not possible to secure the bull wire to the gypsy head, or when the topping lift [wire] itself is taken to the gypsy head, sufficient turns, in no case less than five (5), shall be used.
> 29 C.F.R. § 1918.54(e)

II. DISCUSSION

A. The District Court's Findings of Fact.

[1,2] The appellants challenge several of the district court's findings of fact. These findings can be set aside on appeal only if "clearly erroneous." Fed.R.Civ.P. 52(a). A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); see e.g., Lincoln v. Board of Regents of University System of Georgia, 697 F.2d 928, 940 (11th Cir. 1983). Here, the parties introduced evidence supporting contrary theories of what caused the appellants' injuries. The district court, in turn, made crucial evaluations of witness credibility, particularly where the expert testimony conflicted. Under these circumstances, we should be reluctant to overturn the district court's findings. E.g.,

Charpentier v. Fluor Ocean Services, Inc., 613 F.2d 81, 85 (5th Cir. 1980). Where the evidence supports more than one conclusion and the trial court has decided to weigh it more heavily in favor of one of the litigants, "[s]uch a choice between two permissible views of the weight of the evidence is not 'clearly erroneous,'" United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see e.g., Baylor v. Jefferson County Board of Education 733 F.2d 1527, 1532 (11th Cir, 1984).

(1) Did the wooden box prevent Ward's escape?

[3] The district court found that the wooden box was in no way related to the falling of the boom nor did it prevent Ward's escape from the flying bull wire. The court also found that the size of the available work space was sufficient for the safe operation of the cargo equipment. Seeking on appeal to convince this Court that these findings of fact were clearly erroneous, the appellants cite the testimony of

of the appellees' own expert witness, Captain Jennings, who testified that if the box had not been present Ward could have escaped.

After examining the full record, however, we are not convinced that the district court's findings are clearly erroneous. Although the box may have impeded Ward's flight in one direction, it appears that other avenues of escape were available. Indeed, Freeman dove in another direction and sustained less serious injuries. The testimony also supports the appellees' position that the accident happened too quickly for Ward to have escaped in any direction, thus rendering irrelevant the placement of the box. More importantly, for us to accept the appellants' claim that the placement of the box proximately caused their injuries would require a ruling on appeal that the appellees were under a duty to foresee this negligence and position the box accordingly. The evidence in the record more than adequately supports the district court's finding that the

workers' failure to employ a shackle and engage the locking bar, not the appellees' placement of the wooden box, proximately caused the appellants' injuries. The appellants have not cited any precedent to support imposing liability on the appellees for failing to foresee the negligence of these longshoremen and mitigate their injuries.

(2) Was the locking bar in proper working condition?

[4] At trial the appellants proffered testimony by, among others, the co-worker who had operated the locking bar that the bar was bent and rusted stiff before the accident occurred. The appellants' expert witness then testified that a bent and stiff locking bar was a substantial factor in causing the accident. Based on this evidence, the appellants challenge the district court's finding that the locking bar was in proper working condition prior to the accident and that the bend in the bar did not

cause, but rather resulted from, the falling of the boom.

On cross examination of the co-worker, however, the appellees raised a significant question as to the reliability of his testimony by showing that he had not mentioned the bent and stiff condition of the locking bar in a statement made to OSHA representatives shortly after the accident. Moreover, a visual inspection by the ship's chief officer one day before the accident had revealed no defect in the locking bar. On the day of the accident, as the boom fell, the chief officer heard a rapid clanking noise. This is consistent with the appellees' theory that the locking bar was operative, not rusted stiff, and that it was bent as a result of repeatedly falling onto the rapidly spinning ratchet wheels. Two expert witnesses testified on behalf of the appellees that the locking bar was in proper working condition before the accident. These witnesses opined that the ratchet teeth had been

mashed as a result of the locking bar hitting the ratchet wheels as the topping lift reel spun. A third expert agreed, based upon his inspection of the ratchet teeth and paint chips found on the platform floor. The district court considered all of this evidence before finding that the condition of the locking bar had not contributed to the appellants' injuries. The court expressly credited the testimony of the appellees' expert witnesses and discredited that of the appellants' expert witness. Our review of the record leaves us convinced that the district court's finding is not clearly erroneous.

(3) Was the cargo equipment negligently left unrigged?

The appellants base this claim on an alleged custom among cargo vessels to enter port with their booms fully rigged. Had the equipment been rigged, Ward and Freeman would not have had to work with the loose bull wire. Thus, the appellants argue that the unrigged condition of

the cargo boom breached the appellees' duty to deliver a reasonably safe vessel to the longshoremen who were to unload it. Scindia, supra, 451 U.S. at 167, 101 S.Ct. at 1622.

[5,6] In response, the appellees cite testimony by Ward and Freeman that they had often rigged cargo booms without using shackles. This admission of their experience in rigging cargo booms completely undermines the appellants' argument that a custom in fact existed and that delivering the OSWEGO PLANTER to the longshoremen with the boom not rigged constituted negligence. Moreover, not every breach of custom will serve as a predicate for liability. Custom is not dispositive in negligence actions. See Texas and Pacific Railway Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.")

B. The Admission of the Safety Report as Evidence.

At trial the appellees introduced as evidence a certificate prepared by the American Bureau of Shipping ("ABS") after an inspection of the OSWEGO PLANTER only four days before the accident occurred. Despite several relevant discovery requests, the appellants did not learn of this certificate until nine months after the court-imposed deadline for completing discovery had expired, just twenty-eight days before the trial began. The district court denied the appellants' motions to exclude the introduction of the ABS certificate and, in the alternative, to reopen discovery for the limited purpose of exploring the basis for the vessel's certification. The appellants now claim that the court abused its discretion in denying these motions.

[7-9] A district court's ruling to admit or exclude evidence because of one party's failure

to comply with the limits imposed on discovery is not to be disturbed absent a clear abuse of discretion. E.g., Port Terminal & Warehousing Co. v. John S. James Co., 695 F.2d 1328, 1335 (11th Cir. 1983). There is no question that the appellees here failed to comply with the rules of discovery and deliver the inspection certificate when requested. However, the ABS certificate simply comprises cumulative evidence of the cargo equipment's proper working condition. The ship's chief officer had inspected the cargo gear on the day before the accident. Only two months before, the equipment had been inspected and certified safe by the International Cargo Gear Bureau. Several expert witnesses testified at trial that the cargo gear was in proper working condition before the accident. Therefore, we hold that the district court's admission of the ABS certificate, if improper, was nevertheless harmless. E.g., Coughlin v. Capitol Cement Co., 571 F.2d 290, 307 (5th Cir. 1978). Similarly, the court's

refusal to reopen discovery, if an abuse of discretion, was harmless. We can find no indication in the record that the appellants would have altered their trial preparation or the presentation of their case had further discovery been permitted.

AFFIRMED.

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHNNY WARD,
Petitioner,

v.

L & C MARINE TRANSPORT, LTD.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO REVIEW

GEORGE H. CHAMLEE
Counsel of Record
GUSTAVE R. DUBUS, III
CHAMLEE, DUBUS, SIPPLE & WALTER
P. O. Box 9523
Savannah, Georgia 31412
912-232-3311
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Respondents, being dissatisfied with the presentation by Petitioners of the question presented for review, point out to this Honorable Court that the Petitioners present one question for review but argue another. Further both the question presented and the question argued by Petitioners are so vague as to be almost incomprehensible.

It appears to Respondents that Petitioners are in reality asking this Court to provide a further review of the findings of fact of the District Court and determine whether or not they were clearly erroneous. That is unquestionably not the function of this Court. Apparently realizing this, Petitioners in their Argument raise the question, unmentioned in the Question Presented for Review, of an alleged conflict among the circuits in the application of the standard of review prescribed by Rule 52(a), Fed. R. Civ. P.

If Petitioners have stated any question for review, it can only be whether the Court of Appeals for the Eleventh Circuit applied the correct standard in reviewing the findings of fact of the District Court. Respondents believe that there is no question that it did and that there is no basis for this Court to review the case.

LIST OF ALL PARTIES

Since the Petition for Writ of Certiorari does not contain the names of all parties to the proceeding in the Court of Appeals for the Eleventh Circuit, Respondent lists them herewith:

L. & C. Marine Transport, Ltd.
Oswego Latex Carrier Corp.
The Firestone Tire & Rubber Company
Marine Transport Management, Inc. (formerly known as Marine Transport Lines, Inc.)
Marine Transport Lines, Inc. (formerly known as General American Transportation International Finance Corporation).

Complainants-Appellees-Respondents

Johnny Ward
Linda Ward
Robert Freeman

Claimants-Appellants-Petitioners

Reliance Insurance Company

Claimant (Subrogated Worker's Compensation Insurer)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. PETITIONERS' IMPLIED REQUEST IN THE QUESTION PRESENTED THAT THIS COURT REVIEW THE FINDINGS OF FACT	7
II. PETITIONER'S ARGUMENT THAT THERE IS A CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE STANDARD FOR REVIEWING FINDINGS OF FACT	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	8
Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153 (1950)	8
L. & C. Marine Transport, Ltd. v. Ward, 755 F.2d 1457 (11th Cir. 1985)	5, 8
McAllister v. United States, 348 U.S. 19, 22-23 (1954)	9
Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936)	7-8
St. Louis Testing Laboratories, Inc. v. Mississippi Valley Structural Steel Co., 375 F.2d 565, 567 (8th Cir. 1967)	9
Scindia Steam Navigation Co. v. Santos, 451 U.S. 156 (1981)	4
United States v. United States Gypsum Corp., 333 U.S. 364 (1947)	9
W.R.B. Corp. v. Geer, 313 F.2d 750, 753 (5th Cir. 1963)	9
Statutes, Rules and Regulations:	
33 U.S. Code § 905(b)	1
46 U.S. Code §§ 183-189	1
U.S. Sup. Ct. Rule 17, 28 U.S. Code	7, 10
Fed. Rules Civ. Proc. Rule 52(a), 28 U.S. Code	6, 7, 9
Fed. Rules Civ. Proc. Rule 52(e)(3), 28 U.S. Code	9
29 CFR § 1918.54(e)	5
Treatises:	
5A Moore's Federal Practice § 52.12, pp. 52-202-203	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-327

JOHNNY WARD,

Petitioner,

v.

L & C MARINE TRANSPORT, LTD.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO REVIEW

STATEMENT OF THE CASE

Petitioners JOHNNY WARD and ROBERT FREEMAN were longshoremen who were injured aboard the M/V OSWEGO PLANTER on May 26, 1981. Petitioner WARD and his wife filed suits in the Superior Court of Chatham County, Georgia, on September 25, 1981, claiming negligence on the part of the vessel interests under 33 U.S. Code § 905(b). They sought damages totalling $103,000,000.00. Owners and operators of the ship filed a Petition for Exoneration from or Limitation of Liability, pursuant to 46 U.S. Code §§ 183-189, in the United

States District Court for the Southern District of Georgia. A bond was posted and the District Court enjoined other suits. Petitioners filed claims for damages in excess of $103,100,000.00 in the exoneration/limitation proceeding and answers denying that the vessel interests were entitled to exoneration or limitation. Additional vessel interests intervened as Complainants in the exoneration/limitation proceeding when the WARDS named them as defendants in the Superior Court suit.

WARD and FREEMAN were injured during an operation in which their gang of longshoremen were on one of the ship's masthouses, lowering a ship's boom to rig it for use in cargo operations. The longshoremen lost control of the boom. As a result the boom fell, and this further resulted in a quantity of wire being pulled onto an unpowered reel at high speed. The rapid movement of this wire injured the two men.

The booms are raised and lowered as follows: A steel cable, known as the topping lift wire, runs through the head of the boom to an unpowered winch, known as the topping lift reel, on the masthouse, and is affixed by threading the other end of the wire (known as the bitte end or dead end) through a hole in the spool of the topping lift reel and clamping it to prevent its pulling out. Unreeling the topping lift wire allows the head of the boom to come down. Reeling in pulls it up. The spool of the topping life reel is divided into two parts by a steel divider plate. By affixing another steel cable, known as the bull wire, to the spool on the other side of the divider plate and applying a source of power to move the bull wire, the boom can be raised or lowered depending upon whether one winds the bull wire onto the spool or unwinds it. The topping lift reel is equipped with a ratchet which rotates with the spool. When the boom is in the desired position, a locking bar, which operates by gravity, can be dropped into the teeth of the ratchet, locking the boom in place. In order to raise or lower the

boom, this locking bar must be lifted out of the teeth of the ratchet. This locking bar, although sometimes referred to as a brake bar, is not intended for use in stopping or braking a falling boom.

Also on the masthouse are four electrically powered winches which provide power in loading and unloading cargo. Each winch is also fitted with a drum having the shape of a concave cylinder which rotates when the winch is operated. These drums are known as gypsies or gypsyheads. On the OSWEGO PLANTER, each gypsyhead has a slot through which cables can be passed and secured. The securing is normally by a shackle attached to the end of the bull wire which prevents the bull wire from pulling through the slot on the gypsy.

Each of the four booms on the OSWEGO PLANTER is supplied with a bull wire and shackle. When not in use, the bull wires, with the shackles affixed to one end, are coiled up and placed on the top of the topping lift reels.

The longshoremen failed to shackle the bull wire to the gypsy and to wind the bull wire onto the gypsy. Instead, they took the bull wire and made several turns around the gypsy, with Petitioner FREEMAN then feeding the bull wire around the gypsy to let the boom down. The excess bull wire was scattered on the masthouse deck. FREEMAN lost control of the bull wire which deprived the longshoremen of any control of the boom. The boom fell, pulling the bull wire onto the topping lift reel. The rapid drawing of the bull wire onto the topping lift reel injured Petitioners.

The exoneration/limitation proceeding went to trial before the District Court, sitting without a jury, on January 30, 1984 and was completed on February 2, 1984. Claimants-Appellants-Petitioners WARD and FREEMAN claimed that the vessel interests were negligent in numerous respects including:

1. Providing defective and malfunctioning cargo gear consisting of an inoperative and bent locking pawl bar on the topping lift reel;

2. Providing defective and malfunctioning cargo gear consisting of an inoperative topping lift reel that had no functioning braking device;

3. Providing defective and malfunctioning cargo gear consisting of a rusty, worn, bent, ill-cared for bull wire rope which was strewn and ill-stored over the mast house deck;

4. Providing a work space that was insufficient, encumbered, dangerous and unsafe due to a gerry (sic) rigged ill-placed green wooden box;

5. Providing a work area that had a poorly cared for work deck which was slippery;

6. Failing to assist or supervise cargo operations;

7. Failing to provide safe and proper cargo gear to include a complete bull wire and shackle;

8. Failing to provide proper and safe cargo gear and work area and failing to warn of that fact.
(Excerpted from Petitioners' listing of each act of negligence in Pre-Trial Order).

In addition, Petitioners contended that the vessel was negligent:

9. In coming into port with the cargo gear not rigged so that the longshoremen had to rig it.

On March 23, 1984, the District Court rendered comprehensive findings of fact and conclusions of law, ruling that there was no negligence on the part of the vessel interests under the applicable legal standard set forth by this Honorable Court in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981), and subsequent appellate decisions based on *Scindia*. The District Court found

that Petitioners' injuries flowed directly from the negligence of the longshoremen in failing to shackle the bull wire to the gypsy in violation of 29 CFR § 1918.54(e) and in failing to engage the locking bar on the topping lift reel. It found that the ship's gear was in proper operating condition; that the work area was reasonably safe; that the rigging system was familiar to the longshoremen and no hidden dangers requiring warning were present; and that the shipowner had no knowledge of the negligence of the longshoremen.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioners urged that the District Court's findings of fact were clearly erroneous in:

1. Not finding that the presence of a wooden box prevented JOHNNY WARD from escaping from the loose bull wire and that this box made the work area insufficient

2. Not finding that the locking bar of the topping lift reel was not in working condition prior to the accident

3. Not finding that the fact that the longshoremen had to rig the cargo gear constituted causative negligence.

One other factual error not related to negligence and one legal error were urged before the Court of Appeals.

The Court of Appeals reviewed the record and concluded that the District Court's findings of fact were not clearly erroneous. *L. & C. Marine Transport, Ltd. v. Ward*, 755 F. 2d 1457 (11th Cir. 1985). It examined each of the above three contentions individually and rejected them. Petitioners have, before this Court, raised only the first issue of fact, namely the presence of the wooden box preventing WARD's escape. The Court of Appeals reviewed the District Court's findings on that issue and pointed out that from the full record, it ap-

peared that (1) other avenues of escape were available and (2) there was adequate evidence to conclude that the accident happened too quickly for WARD to have escaped in any direction. Even more importantly, the Court of Appeals pointed out that the cause of the accident was the negligence of the longshoremen in failing to shackle the bull wire to the gypsy and to engage the locking bar of the topping lift reel. To impose liability for the presence of the wooden box would require the vessel to foresee the negligence of the longshormen.

This Petition for Writ of Certiorari followed. The alleged error relates to the determination of the Court of Appeals that the findings of fact of the District Court with respect to the wooden box were not clearly erroneous.

SUMMARY OF THE ARGUMENT

Respondents view the Petition for Certiorari as requesting review in two respects. First, in the Question Presented, Petitioners appear to be asking this Court to engage in a further review of the factual findings of the District Court. Second, in the Argument, Petitioners seem to contend that there is a conflict among the circuits in the application of the standard of review of factual findings prescribed by Rule 52(a), Fed. R. Civ. P. Respondents do not believe either matter merits review by this Court.

In connection with the Question Presented, Respondents point out that this Court is intended to correct errors of law, not errors in fact finding. Under the two-court rule, this Court accepts findings in which two courts concur unless clear error is shown. The opinion of the Court of Appeals for the Eleventh Circuit plainly shows that it carefully reviewed the record in considering Petitioners' argument that the District Court's finding on the factual issue in question was clearly erroneous, and found not only that it was not clearly erroneous but that a contrary finding would not form a legal basis for liability.

In connection with the Argument of a conflict among the circuits, Respondents believe that there is no such conflict. The Court of Appeals employed the standard prescribed by Rule 52(a) and so stated by this Court. The alleged conflict is purely imaginary. The cases from other circuits, cited by Petitioners, do no more than state the standard in slightly different language. There can be no doubt that the Eleventh Circuit Court of Appeals correctly stated and correctly employed the standard.

Petitioners' argument of a conflict among the circuits, not stated in the Question Presented, is a feeble attempt to provide a basis for review where none exists. U.S. Supreme Court Rule 17 sets forth the considerations governing review on certiorari. None of the considerations listed are raised in the Question Presented. Only as an afterthought, Petitioners have argued that there is a conflict among the circuits. This alleged conflict is absolutely nonexistent and argued solely in an attempt to find a basis for review where none exists.

ARGUMENT

I. PETITIONERS' IMPLIED REQUEST IN THE QUESTION PRESENTED THAT THIS COURT REVIEW THE FINDINGS OF FACT

Simply put, Petitioners are dissatisfied with the findings of fact of the District Court and the decision of the Court of Appeals that found them not to be clearly erroneous. They therefore ask this Court to provide yet another level of review of the findings of fact.

That is not the function of this Court. Where this Court is not acting as the initial appellate court, its role is the declaration of the supreme law of the land, 5A *Moore's Federal Practice* ¶ 52.12, pp. 52-202 and 203. For that reason, this Court has adopted a rule under which it accepts findings in which two courts concur unless clear error is shown, *Pick Mfg. Co. v. General*

Motors Corp., 299 U.S. 3 (1936). As this Court stated in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949)

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.", 336 U.S. at 275.

See also *Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 153 (1950).

The opinion of the Court of Appeals, 755 F. 2d 1457 (11th Cir. 1985), demonstrates that it gave very careful consideration to Petitioners' contentions that certain findings of fact of the District Court, including the one complained of in the Question Presented here, were clearly erroneous. On that particular finding, that is, that the wooden box did not prevent WARDS escape, the Court of Appeals stated that it examined the full record, 755 F. 2d at 1462, and was not convinced that the findings were clearly erroneous. It went on to point out that the evidence showed that other avenues of escape were available and that the evidence also supported the conclusion that the accident happened too quickly for WARD to have escaped in any direction. Moreover, the Court of Appeals stated that the evidence in the record more than adequately supported the conclusion of the District Court that the longshoremen's failure to use a shackle and to engage the locking bar was the proximate cause of the injuries. To impose liability based on the placement of the wooden box would thus impose on the vessel owner a duty to anticipate the negligence of the longshoremen. The Court of Appeals noted that Petitioners cited to no precedent for this proposition.

II. PETITIONERS' ARGUMENT THAT THERE IS A CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE STANDARD FOR REVIEWING FINDINGS OF FACT

Petitioners argue that the Court of Appeals directly contravened this Court's standard for review of findings of fact set forth in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1947). Respondents point out that the Court of Appeals directly quoted this Court's standard as set forth in *United States v. U.S. Gypsum* in reviewing the findings of fact, 755 F. 2d at 1461. It is evident that the Court of Appeals utilized the correct standard of review. See also *McAllister v. United States*, 348 U.S. 19, 22-23 (1954).

Petitioners' citation of *W.R.B. Corp. v. Geer*, 313 F. 2d 750, 753 (5th Cir. 1963) and *St. Louis Testing Laboratories, Inc. v. Mississippi Valley Structural Steel Co.*, 375 F. 2d 565, 567 (8th Cir. 1967) as evidence of a conflict among the circuits affords no basis for review by this Court.

First, there is no question that the Eleventh Circuit utilized the standard prescribed both by this Court in *U.S. Gypsum*, 333 U.S. at 394-395 and by Rule 52(a), Fed. R. Civ. P. Hence there is no possible error to review. Second, a reading of the allegedly conflicting applications of the "clearly erroneous" standard in the Fifth and Eighth Circuits reveals that there is in truth not even a suggestion of conflict. In *W.R.B. Corp.*, the Court of Appeals for the Fifth Circuit simply held that the District Court, in reviewing a master's findings of fact, had not employed the "clearly erroneous" test (prescribed for that case by Rule 53(e)(2), Fed. R. Civ. P.), 313 F. 2d at 753. In *St. Louis Testing*, the Eighth Circuit merely applied the principle of the "clearly erroneous" standard in language which did not quote precisely the statement of the standard from *U.S. Gypsum* and Rule 52(a). There is absolutely nothing in either

of these cases to indicate that there is any conflict in the application of the standard.

CONCLUSION

This Court is a Court of the correction of errors of law, not errors in fact finding. The District Court and the Court of Appeals have found the facts adverse to Petitioners. Under the two-court rule, there is no reason for this Court to provide Petitioners with yet another level of review of the facts.

There is no conflict among the circuits as to the application of the "clearly erroneous" standard, requiring resolution by this Court. The Eleventh Circuit Court of Appeals correctly applied the standard prescribed by this Court and by the Federal Rules of Civil Procedure.

There is no basis for this Court to review this case. None of the considerations of Rule 17 are remotely involved. The argument of a conflict among the circuits is merely an attempt to create a basis for review where none exists. The petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE H. CHAMLEE
Counsel of Record
GUSTAVE R. DUBUS, III
CHAMLEE, DUBUS, SIPPLE
& WALTER
P. O. Box 9523
Savannah, Georgia 31412
912-232-3311
Attorneys for Respondents